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Iskandar Zulkarnain bin Zolkifly v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05(M)-449–10 OF 2019
ABDUL KARIM, HAS ZANAH MEHAT AND ABU BAKAR JAIS JJCA
7 FEBRUARY 2022

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — High Court found appellant guilty of murder — Appellant was convicted and sentenced to death — Whether High Court judge failed to consider evidence of pathologist — Whether High Court judge failed to determine which limb of s 300 of the Penal Code had been proven by prosecution — Whether exceptions to s 300 of the Penal Code applicable — Whether learned High Court judge was correct in finding that there was no grave and sudden provocation — Whether learned High Court judge correct in finding that appellant failed to raise reasonable doubt — Whether conviction was safe — Penal Code ss 300(c) & 302

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The appellant was charged under s 302 of the Penal Code ('the PC') for the offence of murder. The prosecution relied on the following circumstantial evidence: (a) PW3 heard the victim crying for help; (b) PW3, PW4 and PW5 found the victim lying on the floor in a pool of blood; (c) PW3, PW5 and PW7 testified that the appellant stayed in the house with the victim; (d) PW5 found a knife and a pair of scissors near the victim; (e) PW3 and PW5 saw the appellant motorcycle was parked in front of the house; (f) the chemist ('PW11') found the victim's DNA on the appellant's fingernails; and (g) the evidence of the pathologist ('PW12') that the knife and pair of scissors were objects that could be used and consistent with the kind of injuries suffered by the victim. At end of the prosecution's case, the learned High Court judge ('the HCJ') found that prima facie case was established and called the appellant to enter defence. In defence, the appellant admitted that he repeatedly stabbed the victim, but the action was due to grave and sudden provocation by the victim who had insulted the appellant's parents. The HCJ rejected the appellant's defence and accordingly found the prosecution had proven its case beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to death. Aggrieved by the decision, the appellant filed the present appeal premised on the following submissions: (i) the HCJ failed to consider the testimony of PW12 ('the first submission'); and (ii) the HCJ failed to determine which limb of s 300 of the PC had been proven by the prosecution ('the second submission').

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Held, affirming the High Court's decision, and dismissing the appeal:

(1) In relation to the first submission, the counsel for the appellant had contradicted himself because para 7 of his own written submission admitted that the HCJ had considered the evidence of PW12. Further, the written submission had also referred to instances where the HCJ had considered the evidence of PW12. Substantial part of the HCJ's grounds of judgment also dealt with the evidence of PW12. Therefore, it was abundantly clear that the appellant's submission that the HCJ had failed to consider the evidence of PW12 was totally misconceived (see paras 44–48).

(2) The second submission was incorrect because the appellant's counsel had acknowledged in paras 6–7 of his written submission that the HCJ had determined which limb of s 300 of the PC had been proven by the prosecution. Hence, this was not a case where the HCJ had not determined which limb of s 300 of the PC had been proven by the prosecution. The HCJ had clearly concluded that the appellant had intended to cause the bodily injuries which he knew that the bodily injuries would be sufficient in the ordinary course of nature to cause death of the victim as pointed out under s 300(c) of the PC (see paras 49–51).

(3) What was only needed by the prosecution in satisfying s 300(c) of the PC, following the Federal Court case of *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479 was to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death. The first element was satisfied by the appellant's evidence that he had repeatedly stabbed the victim. As for the second element, PW12 had given evidence and her post-mortem report noted that the injury to the head was the cause of death. Based on the above findings, both elements of s 300(c) of the PC had been proven by the prosecution, as such, the culpable homicide was murder committed by the appellant (see paras 65–67 & 87).

(4) The exceptions under s 300 of the PC did not apply for the appellant. Regarding the first exception, as found by the HCJ there was no deprivation of the power of self-control by grave and sudden provocation on the part of the appellant. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, was a question of fact. There was no good reason for the court to disturb the findings of fact by the HCJ because he was the trial judge and had the advantage of hearing the witnesses first-hand (see paras 68–69 & 75).

(5) The second exception did not apply for the appellant because he was not exercising his right of private defence based on the facts of this case. The third exception also could not apply for the appellant as he was not a public servant. The fourth exception was inapplicable because the

appellant admitted that he repeatedly stabbed the victim which proved that the appellant had acted in a cruel manner. He also acted in an unusual manner because he stabbed the victim, then went to the kitchen to get a drink and went back to the victim to continue stabbing her. The fifth and last exception did not apply for the appellant because the victim did not in any manner consented to take the risk of death (see paras 76–79).

(6) Overall, it was correct for the HCJ to find that the appellant had failed to raise a reasonable doubt in this case. The HCJ had not erred in any manner in convicting the appellant for the offence charged and sentencing him to death. The conviction was safe (see paras 88–89).

[Bahasa Malaysia summary

Perayu didakwa di bawah s 302 Kanun Keseksaan ('KK') atas kesalahan membunuh. Pihak pendakwaan bergantung kepada keterangan mengikut keadaan berikut: (a) PW3 mendengar mangsa menangis meminta tolong; (b) PW3, PW4 dan PW5 mendapati mangsa terbaring di atas lantai dalam keadaan berlumuran darah; (c) PW3, PW5 dan PW7 memberi keterangan bahawa perayu tinggal di rumah tersebut bersama mangsa; (d) PW5 menemui sebilah pisau dan sebilah gunting berhampiran mangsa; (e) PW3 dan PW5 melihat motosikal perayu diletakkan di hadapan rumah; (f) ahli kimia ('PW11') menemui DNA mangsa pada kuku perayu; dan (g) keterangan pakar patologi ('PW12') bahawa pisau dan sepasang gunting adalah objek yang boleh digunakan dan konsisten dengan jenis kecederaan yang dialami oleh mangsa. Pada akhir kes pendakwaan, hakim Mahkamah Tinggi yang bijaksana ('HMT') mendapati bahawa kes prima facie telah dibuktikan dan memanggil perayu untuk membela diri. Dalam pembelaan, perayu mengaku telah menikam mangsa berkali-kali, namun tindakan tersebut disebabkan oleh bangkitan marah besar dan mengejut oleh mangsa yang telah menghina ibu bapa perayu. Hakim Mahkamah Tinggi menolak pembelaan perayu dan dengan itu mendapati pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Akibatnya, perayu telah disabitkan bersalah dan dijatuhkan hukuman mati. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan ini berdasarkan hujahan-hujahan berikut: (i) HMT gagal mempertimbangkan keterangan PW12 ('penghujahan pertama'); dan (ii) HMT gagal menentukan bahagian mana daripada s 300 KK yang telah dibuktikan oleh pihak pendakwaan ('penghujahan kedua').

Diputuskan, mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan:

(1) Berhubung penghujahan pertama, peguam perayu telah bercanggah dengan hujahannya sendiri kerana perenggan 7 hujahan bertulisnya sendiri mengakui bahawa HMT telah mempertimbangkan keterangan PW12. Selanjutnya, penghujahan bertulis tersebut juga merujuk kepada

keadaan di mana HMT telah mempertimbangkan keterangan PW12. Sebahagian besar daripada alasan penghakiman HMT juga membicarakan tentang keterangan PW12. Oleh itu, adalah jelas sekali bahawa penghujahan perayu bahawa HMT telah gagal untuk mempertimbangkan keterangan PW12 hanyalah salah faham (lihat perenggan 44–48).

(2) Penghujahan kedua adalah tidak betul kerana peguam perayu telah mengakui dalam perenggan 6–7 penghujahan bertulisnya bahawa HMT telah menentukan bahagian s 300 KK yang mana yang telah dibuktikan oleh pihak pendakwaan. Oleh itu, ini bukan kes di mana HMT tidak menentukan bahagian mana daripada s 300 KK yang telah dibuktikan oleh pihak pendakwaan. Hakim Mahkamah Tinggi telah membuat kesimpulan dengan jelas bahawa perayu berniat untuk menyebabkan kecederaan tubuh badan yang mana dia tahu bahawa kecederaan tubuh badan tersebut adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian mangsa seperti yang diperlukan di bawah s 300(c) KK (lihat perenggan 49–51).

(3) Apa yang perlu dibuktikan oleh pihak pendakwaan dalam memenuhi s 300(c) KK, berdasarkan kes Mahkamah Persekutuan *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479 hanyalah untuk menunjukkan bahawa kecederaan yang dibuktikan adalah dilakukan dengan niat dan bukan secara tidak sengaja dan bahawa kecederaan tersebut adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian. Elemen pertama telah dipenuhi melalui keterangan perayu bahawa dia telah menikam mangsa berulang kali. Bagi elemen kedua, PW12 telah memberikan keterangan dan laporan bedah siasatnya menyatakan kecederaan di kepala adalah punca kematian. Berdasarkan dapatan-dapatan di atas, kedua-dua elemen s 300(c) KK telah dibuktikan oleh pihak pendakwaan, oleh itu, mematikan orang dengan salah adalah membunuh telah dilakukan oleh perayu (lihat perenggan 65–67 & 87).

(4) Pengecualian-pengecualian di bawah s 300 KK tidak terpakai untuk perayu. Berkenaan dengan pengecualian pertama, seperti yang didapati oleh HMT tidak terdapat ketiadaan kuasa kawalan kendiri melalui bangkitan marah besar dan mengejut di pihak perayu. Sama ada bangkitan marah tersebut adalah besar dan mengejut untuk menghalang kesalahan tersebut daripada terjumlah kepada membunuh, adalah persoalan fakta. Tiada alasan kukuh untuk mahkamah mengganggu dapatan-dapatan fakta oleh HMT kerana beliau adalah hakim bicara dan mempunyai kelebihan mendengar saksi-saksi secara langsung (lihat perenggan 68–69 & 75).

(5) Pengecualian kedua tidak terpakai untuk perayu kerana dia tidak menggunakan hak pembelaan persendiriannya berdasarkan fakta kes ini. Pengecualian ketiga juga tidak terpakai kepada perayu kerana dia bukan

penjawat awam. Pengecualian keempat tidak terpakai kerana perayu mengaku telah menikam mangsa berulang kali yang membuktikan perayu telah bertindak kejam. Dia juga bertindak luar biasa kerana menikam mangsa, kemudian ke dapur untuk mendapatkan minuman dan kembali menemui mangsa untuk terus menikamnya. Pengecualian kelima dan terakhir tidak terpakai kepada perayu kerana mangsa tidak dalam apa-apa cara sekali pun bersetuju untuk mengambil risiko kematian (lihat perenggan 76–79).

(6) Secara keseluruhannya, HMT adalah betul dalam memutuskan bahawa perayu telah gagal menimbulkan keraguan munasabah dalam kes ini. Hakim Mahkamah Tinggi tidak melakukan apa-apa kekhilafan dalam mensabitkan perayu atas kesalahan yang didakwa dan menjatuhkan hukuman mati. Sabitan tersebut adalah selamat (lihat perenggan 88–89).]

Cases referred to

Bala Anak Matik v PP [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003 1 CLJ 734, CA (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ Rep 162, SC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Pubalan a/l Peremal v PP [2020] 5 MLJ 442; [2020] 8 CLJ 306, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Zulkiple bin Mohamad v PP [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

Penal Code ss 84, 299, 300, 300(c), 302

Appeal from: Criminal Trial No CB-45B-3–04 of 2018 (High Court, Temerloh)

Rajpal Singh (Tiew Poh Nee with him) (Rajpal, Firah & Vishnu) for the appellant.
Ku Hayati Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abu Bakar Jais JCA:

A mistake repeated more than once is a decision — Paulo Coelho

INTRODUCTION

[1] This is an appeal against the decision of the High Court ('HC'). The HC had convicted the appellant for the offence of murder punishable under s 302 of the Penal Code and sentenced him to death.

[2] At the outset, it is most important to bear in mind, in this case, there was only one issue raised by the appellant's counsel in support of the appeal. This is highlighted so that it is appreciated there is little need to be too elaborate in our grounds of judgment here, lest we lose focus on the limited approach taken by the appellant on this appeal. This issue will be explained in the course of this judgment.

CHARGE

[3] The charge against the appellant at the HC reads as follows:

> Bahawa kamu pada 21.10.2017 di antara jam lebih kurang 8.30 malam, bertempat di dalam rumah No 23 Jalan Temerloh Makmur 3, Taman Temerloh Makmur, di dalam daerah Temerloh, Dalam Negeri Pahang telah melakukan bunuh dengan menyebabkan kematian Robiatul Ain bintl Mohamod, No KP: 900920–06–5020 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

MENTAL CONDITION

[4] Before trial at the HC, on the request of the appellant's counsel, he was sent to Permai Hospital Johor Bharu for observation and examination of his mental condition.

[5] After examination, the psychiatrist at Permai Hospital, Dr Johari Khamis gave his report that the appellant did not suffer from mental illness and was capable of appreciating and knowing the reason and effect of his action at the time of the incident. The appellant was also fit to stand for trial. Only after this report, the full trial began at the HC.

THE PROSECUTION'S CASE

[6] PW3, Fakhrul Hazman Abu Bakar testified that he was a neighbour of the deceased/victim. He said he knew the victim as 'Kak Ain' and her husband as 'Zizi'. PW3 said that he also knew of the appellant and he saw the appellant several times at the victim's house, which was the scene of the crime.

[7] On 21 October 2017 at about 9pm at his house, he heard a cry for help and he recognized the voice was from the victim. He heard the victim shouting to him 'Angah, tolong Kak Ain'. PW3 then immediately sent a whatsapp's message to the brother of the victim, PW5, Hairol Anuar Mohamod. He informed PW5 that he heard the victim's cry for help. He was certain that the appellant was in the victim's house as the appellant's motorcycle was parked in front of the same.

[8] PW5 rushed to the victim's house upon being informed by PW3 of what he heard. On arrival there, PW5 had knocked on the front door of the house but no one answered. He tried opening the door but it was locked. He then kicked the door opened and entered the house with PW3 and PW4, Abu Bakar Mohamed, who was the father of PW3. The appellant's motorcycle was still parked in front of the house.

[9] Entering the house, PW5 saw the victim lying down in a pool of blood. He found a knife and a pair of scissors near the victim. He took both and threw them in front of the house as he was afraid the appellant would still be in the house. PW5 found that the backdoor of the house was ajar and suspected the appellant was in the house at the time of the incident as his motorcycle was still parked in front of the house.

[10] PW5 confirmed that the appellant was his employee, working as a car cleaner and staying with PW7, Azizi Adam, the victim and her husband. PW7, a lorry driver testified he was staying with the appellant at the victim's house. He gave evidence that he left the house at about 9am on that day and before he left the house, the appellant told him that he was not working as he was on leave.

[11] Police officer, PW10, Saiful Hafiz Ahmad Shamsuri, testified that about 10pm on the same date, on a search, he arrested the appellant hiding in a bush behind the victim's house. He found the appellant's trousers and belt was covered in blood. PW10 then made a police report.

[12] Later, led by the appellant, at about 1.35am the next day, the appellant showed PW9, Mohamed Rasul Mohamed, another police officer the shirt and a cap he was wearing at the time of the incident. Both were recovered behind the house.

[13] PW11, Siti Hajar Hussin, the chemist testified that the victim's DNA was found on the fingernails of the appellant, the knife and pair of scissors recovered at the victim's house. The appellant's DNA was also found on the knob of the backdoor.

[14] PW12, Dr Siti Marni Zainal Abidin, the forensic medical expert or pathologist from Tengku Ampuan Afzan Hospital testified that she did the victim's post mortem. She found that the cause of death was injury to the head and pressure exerted on the victim's neck. She said the injuries on the face and head are consistent with the use of a sharp object, like the knife and a pair of scissors found at the house of the victim.

AT THE END OF THE PROSECUTION'S CASE

[15] Though the prosecution depended on circumstantial evidence, the learned HC judge ('HCJ') found four elements of the offence at the end of the prosecution case as follows:

(a) the victim had died;

(b) the victim died as a result of the injuries sustained;

(c) the death was caused by the appellant; and

(d) the appellant intended to inflict the injuries on the victim which he knew under ordinary cause of nature would be sufficient to cause death.

[16] The learned HCJ also accepted the evidence of PW12 that the injuries on the face and head are consistent with the use of a sharp object, like the knife and scissors found at the house of the victim. While injuries to the neck could be caused by strangling the victim.

[17] The evidence tendered at the end of the prosecution's case, as narrated, was subjected to maximum evaluation by the learned HCJ. Having evaluated all the evidence at the end of the prosecution's case on maximum evaluation, the learned found a prima facie case against the appellant has been proved by the prosecution. Thus, the learned HCJ called the appellant to enter his defence.

DEFENCE

[18] The appellant chose to give evidence on oath. He also called DW2, Dr Johari Khamis, the same physiatrist from Hospital Permai, who examined him before trial.

[19] The appellant testified that he stayed with the victim. The appellant gave evidence that the victim had always complained about the appellant regarding his conduct and the fact that he was always on leave. The appellant could not tolerate what was said by the victim. The victim had always expressed her anger on the appellant. The victim had reminded him that she had provided him a place to stay and she had reprimanded him for being on leave. He felt angry when the victim was abusive and disrespectful against him.

[20] On the day of the incident, the appellant admitted he was with the victim at the house as he was on leave. There was no one else. On a nap, he was woken by the victim between 5.30pm and 6pm. He said the victim was unhappy that he was not working and had scolded him and accused him of stealing her money. She also said that the appellant was just like his parents who

like to cause problems to her and her family. According to the appellant, the victim further said when he has been given a place to stay, he would treat it as his own place. He would disappear when he has made it but will return when things did not turn out as it should.

[21] Appellant said he felt so angry when the victim mentioned his parents in that manner and he had lost his composure when that was said. He could not control his anger. He said his action on the victim on that day was not premeditated. He admitted he stabbed the victim several times, took time to drink and then continued to stab the victim.

[22] DW2, the physiatrist testified he examined the appellant. He said the appellant suffered from antisocial personality disorder but this was not caused by mental disorder. He also confirmed the appellant's conduct on that day was not caused by his drug addiction.

AT THE END OF THE DEFENCE

[23] The learned HCJ found essentially the defence of the appellant was that there was grave and sudden provocation against him by the victim and that he was of unsound mind at the material time. The appellant argued he could not be convicted for murder.

[24] The learned HCJ found that the appellant told the court that he was very angry when the victim was abusive and insulted his parents only when he testified at the defence stage. The witnesses of the prosecution were never cross-examined about this when they testified during the prosecution stage. This according to learned HCJ only proved and showed that it was an afterthought by the appellant.

[25] The learned HCJ found that what was said allegedly by the victim against his parents could not result in the appellant to lose control of himself. There was no evidence why the words of the victim against his parents had made him so angry. There was also no evidence of the background of his parents and whether they too had sought accommodation from the victim and her family. The learned HCJ found without this evidence, the alleged words of the victim against his parents, could not be a real basis that he was facing a grave and sudden provocation.

[26] The learned HCJ noted the appellant admitted in his testimony that he had repeatedly stabbed the victim until she fell on the floor. He then said he went to take a drink at the kitchen and then came back to stab the victim with the pair of scissors. There was no evidence that the victim continued to provoke the appellant even if the provocation was true. After he stabbed her, he took a

short break and then continued to stab her. The action of the appellant was purely brutal. His repeated stabbing of the victim, even taking a break to have a drink, in between the stabbings and causing serious injuries was not consistent with provocation. He knew his action meant that death would ensue.

[27] The learned HCJ also said there could not be pent-up feelings on the appellant as even if the victim had scolded him a few times before, there would have been a cooling off period in between those alleged unpleasant and strong words used by the victim. The learned HCJ found there could not be sustained provocation on the appellant.

[28] DW2's evidence and the report he prepared, P60, too indicated the appellant was not suffering from mental disorder. During the incident, the appellant was well aware that his action was against the law. He was not legally insane and therefore could not rely on the defence of insanity. Further, even when he gave evidence, the appellant never said his action was due to the influence of drugs.

[29] The learned HCJ also found there was no evidence from any other witnesses supporting the appellant that the victim had been abusive towards his parents before the incident. Neither was this raised when the prosecution's witnesses testified. Based on the whole of the evidence before the court, the learned HCJ found that the allegation there was a grave and sudden provocation was merely a concoction of the appellant.

[30] The appellant admitted he ran away and was arrested behind the house, hiding in a bush. The appellant action of running away meant that he was fully aware of his unlawful action.

[31] He was fully aware that the injuries he inflicted on the victim could cause death. PW12's evidence was clear that the injury on the victim's head had caused her death.

[32] The learned HCJ also found, based on evidence or the lack of it that the appellant had failed to prove there was grave and sudden provocation. Further, the appellant had failed to prove the defence of insanity during the incident.

[33] The learned HCJ also accepted the prosecution's case as narrated earlier. Though the prosecution's case relied on circumstantial evidence, the cumulative evidence tendered through witnesses for the prosecution, proved the strength of the circumstantial evidence against the appellant, according to the learned HCJ.

[34] The learned HCJ found that the appellant during trial, did not challenge among others, the evidence as follows:

(a) PW3 heard the victim crying for help;

(b) PW3, 4 and 5 found the victim lying on the floor in a pool of blood;

(c) PW5 found a knife and a pair of scissors near the victim;

(d) PW3 and 5 saw the appellant motorcycle was parked in front of the house;

(e) the appellant would only leave the house using his motorcycle;

(f) PW3, 5 and 7 testified the appellant stayed in the house with the victim;

(g) the appellant was alone with the victim when the incident happened as the victim's husband and PW7 were at work;

(h) the appellant told PW7 that he was on leave on that day;

(i) the appellant was arrested while hiding in a bush behind the house;

(j) the appellant's trousers and belt were soaked in blood;

(k) the appellant threw his shirt he was wearing behind the house;

(l) the appellant showed to the police where he had thrown his shirt;

(m) PW11, the chemist found the victim's DNA on the appellant's fingernails;

(n) the victim's DNA was also found on the knife and scissors;

(o) the victim's DNA was likewise found on the chest of the appellant; and

(p) PW12's evidence that the knife and pair of scissors are objects that could be used and consistent with the kind of injuries suffered by the victim.

[35] The learned HCJ found the circumstantial evidence adduced proved the irresistible inference that the appellant had the intention to cause the injuries to the victim, knowing the injuries under ordinary cause of nature would be sufficient to cause death. The circumstantial evidence also proved that no one else had caused the injuries to the victim.

[36] The learned HCJ also found the appellant's intention to cause the injuries could be deduced through the evidence of PW12, the pathologist. She had testified that the objects such as the knife and a pair of scissors found at the house could be used to inflict the kind of injuries sustained on the head and face of the victim.

A **[37]** Further, through the testimony of PW12, it was found that the injuries on the face and head of the victim had caused blood loss to affect oxygen supply to vital organs of the victim. While pressure on the victim's neck caused difficulty in breathing, also affecting oxygen supply to vital organs.

B **[38]** As earlier stated, she found that the cause of death was injury to the head and pressure exerted on the victim's neck.

[39] The learned HCJ also accepted the evidence of the prosecution's witnesses as credible. The prosecution had proven its case beyond reasonable C doubt and the appellant in turn was unable to cast a reasonable doubt on the prosecution's case. Hence the learned HCJ, convicted the appellant for murder based on the charge against him and sentenced him to death.

D APPEAL

[40] Although the appellant's petition of appeal referred to several grounds, when counsel of the appellant came before us for oral submission, he was candid in saying that he will pursue only one issue for the appeal. This is E reflected in the audio recording of the proceeding before us, if it is ever needed to be referred to. He then alerted us to part 'C', para 4 of his written submission. This part of the written submission reflected this single issued. It is stated as follows:

F C. THE LEARNED TRIAL JUDGE FAILED TO CONSIDER THE EVIDENCE OF PW12 AND FAILED TO MAKE AN AFFIRMATIVE FINDING AS TO WHICH LIMB OF SECTION 300 WAS PROVEN BY THE PROSECUTION

G **[41]** As narrated above, this sole issue relates to the argument that the learned HCJ failed to consider the evidence of PW12 and consequently failed to make an affirmative finding as to which limb of s 300 of the Penal Code was proven by the prosecution.

H **[42]** It is important to note that because of the stand taken by the appellant's counsel in pursuing this single issue, we are no longer concerned for instance, whether the appellant was actually involved in the incident. Neither are we concerned whether the appellant had actually inflicted the injuries on the victim. This is not disputed now by the appellant. The single issue pursued I meant there is admission that the appellant had inflicted the injuries. Neither is the appellant submitting that the chain of circumstantial evidence had been broken. Thus, the limited scope of appeal by the appellant now must be appreciated.

OUR DECISION

[43] First, although counsel for the appellant said he would pursue one issue, the argument of the appellant on this single issue, as can be seen above, is actually divided into two parts, as follows:

(a) the learned HCJ failed to consider the testimony of PW12; and

(b) the learned HCJ failed to determine which limb of s 300 had been proven by the prosecution.

[44] In respect of the first part, with respect the appellant's counsel had contradicted himself. This is because para 7 of his own written submission admitted the learned HCJ had considered the evidence of PW12. This paragraph states as follows:

> We humbly submit that the learned trial judge erred and misdirected when his Lordship wrongly admitted and accepted the evidence of the Pathologist PW12.

[45] Whether the learned HCJ rightly or wrongly admitted and accepted the evidence of PW 12, can only be done after the same was considered. Thus, it was wrong to say that PW12's testimony was not considered by the learned HCJ.

[46] The appellant's submission that the learned HCJ failed to consider the evidence of PW12 is also incorrect as the learned HCJ showed a substantial part of his grounds of judgment dealing with the evidence of PW12. This is reflected in his grounds of judgment as follows:

> [14] Mayat mangsa telah dibedah siasat oleh Dr Sri Marni bt Zainal Abidin (SP12), Pakar Perubatan Forensik Hospital Tengku Ampuan Afzan yang mengesahkan punca kematian si mati adalah disebabkan oleh kecederaan di bahagian kepala dengan tekanan pada leher. SP12 juga telah menyediakan laporan bedah siasat, P56.
>
> [16] Pihak pembelaan tidak mempertikaikan si mati telah mati. SP12 telah melakukan bedah siasat ke atas mayat si mati pada 22 Oktober 2017 jam lebih kurang 11 pagi hingga 2 petang di bilik mayat Hospital Sultan Ahmad Shah. Mayat si mati telah dicamkan oleh SP7. Elemen (i) telah dibuktikan oleh pihak pendakwaan.
>
> Elemen (ii) Kematian si mati akibat daripada kecederaan yang dialaminya
>
> [17] SP12 mengatakan si mati mengalami kecederaan berikut:
>
> (A) kepala dan leher
>
> (1) bahagian muka
>
> (a) satu luka lebam (8 x 3.5cm) pada dagu;

(b) satu luka hiris (bercorak gelombang 'wave-like', 2 x 0.4cm) dan satu luka laserasi (1.5cm panjang) pada sebelah kiri dahi;

(c) satu luka hiris (1.3cm panjang), satu luka lebam (3 x 1.5cm) dan satu luka tukusan yang 'clean-cut' (0.8cm saiz, kedalaman 1.5cm) pada pipi kanan.

(d) satu luka hiris (1.3cm panjang), satu luka lebam (3 x 1.5cm) dan satu luka tukusan yang 'clean-cut' (0.8cm saiz, kedalaman 1.5cm) pada pipi kanan;

(e) satu luka hiris (1.5 x 0.5cm) pada telinga kanan dan pipi;

(f) luka-luka lebam (dalam kawasan 8 x 2.5cm) pada hidung;

(g) satu luka lebam (0.8cm saiz) dan satu luka tusukan yang 'clean-cut' (1.3 x 0.5cm, kedalaman 1cm) pada pipi kiri;

(h) satu luka tusukan (0.3cm saiz, kedalaman 3cm) Bersama lebam (0.5 x 0.2cm) pada bibir bawah;

(i) satu luka lebam (0.7cm saiz) pada Bahagian dalam mulut ('frenulum' atas);

(j) satu luka tusukan (bercorak gelombang 'wave-like', 2 x 0.4cm, kedalaman 6.5cm), dengan sisi yang 'clean-cut', pada pipi kiri. Terdapat satu luka lebam (3 x 0.4cm) di bawahnya. Pemeriksaan dalaman pada luka tusukan menunjukkan trek luka tersebut adalah ke arah bawah hingga ke garis rahang kiri, di mana hematoma pada tisu di bahagian itu;

(k) satu luka laserasi berlebam (2.5 x 0.5cm) dan satu luka laserasi (0.7cm saiz) pada sebelah kiri kepala, di atas paras telinga kiri; dan

(l) dua luka hiris (0.4cm saiz dan 0.5cm saiz bersama 1cm 'tailing') dan satu luka lebam (0.6 x 0.5cm) pada cuping telinga kiri.

(2) bahagian kepala.

(a) luka-luka laserasi yang 'superficial' dan abrasi (antara 0.5 dan 1cm saiz) dalam kawasan 6 x 5cm) di bahagian hadapan atas kepala. Luka-luka ini bercorak 'linear' dan hampir segitiga.

(b) tiga luka laserasi (3cm, 4cm dan 2cm panjang) di belakang kepala. Terdapat luka-luka laserasi yang lebih kecil (1cm, 0.8cm dan 0.8 cm panjang) di atas dan bawah luka-luka tersebut. Terdapat juga sekumpulan luka-luka (bercorak gelombang 'wave-like', antara 0.3cm dan 1cm saiz, dalam kawasan 5 x 4cm) di sebelah kiri tiga luka pertama tadi. Kulit kepala juga bengkak (kawasan 17 x 11cm), di mana semua luka-luka laserasi ini terletak.

(c) satu luka tikaman (1.2cm panjang, kedalaman 2.5cm) pada bahagian bawah kanan belakang kepala. Terdapat luka-luka abrasi (antara 0.5cm dan 3cm saiz, dalam kawasan 7 x 8cm) di kawasan berdekatan.

(3) bahagian leher

(a) satu luka lebam (1 x 0.5cm) dan satu luka abrasi (1.3cm panjang) pada bahagian tengah depan leher, di bawah dagu.

(b) satu luka lebam dan satu luka abrasi (setiap satu 0.4cm saiz) di bahagian hadapan kanan leher, berdekatan garis rahang.

(c) luka-luka lebam (dalam Kawasan 3 x 1.5cm) pada bahagian hadapan kiri leher, bawah garis rahang.

(d) satu luka lebam (7 x 0.4cm) pada bahagian atas kiri leher, belakang telinga kiri. A

(e) satu luka laserasi tertusuk (1.6 x 0.4cm, kedalaman 6.5cm) pada bahagian kiri leher, belakang telinga kiri, bawah luka 3d. Pemeriksaan dalaman menunjukkan arah trek ke bawah dan ke hadapan, serta melibatkan kawasan sekeliling 'carotid sheath' kiri (hematoma 8 x 3cm). Salur darah vena kiri ('left internal jugular vein'), salur darah arteri kiri ('left common carotid artery') dan urat saraf kiri ('left vagus nerve') adalah utuh dan tidak tercedera. B

(f) satu luka lebam (4.5cm x 0.5cm) pada bahagian hadapan kiri leher.

(g) satu luka laserasi tertusuk (1.5 x 0.2cm, kedalaman 6cm), satu luka abrasi berlebam yang 'linear' (5cm panjang) dan satu laserasi (1.5x0.2 cm) pada belakang leher. C

(B) dada dan abdomen

(1) bahagian Hadapan Badan

(a) satu luka tusukan (1.3 x 1cm, kedalaman 4.5cm, hampir berbentuk jantung tetapi terbalik) pada bahagian dada, di lokasi tulang selangka kanan, Pemeriksaan dalaman menunjukkan trek luka tidak melibatkan sebarang salur darah besar. D

(b) satu luka abrasi (0.5cm saiz) dan satu luka abrasi 'pin-point' (0.2cm saiz) pada bahagian atas kanan dada.

(c) satu abrasi 'linear' (3.2cm panjang) dan satu abrasi 'pin-point' (0.2cm saiz) dengan kesan lebam di sekelilingnya (2.5 x 2.5cm) pada bahagian atas kiri dada. E

(d) satu luka abrasasi (0.3cm saiz) pada bahagian bawah kiri dada.

(2) bahagian belakang badan

(a) satu luka abrasi berlebam yang 'linear' (3cm panjang) di bahagian atas belakang badan, sepanjang garis tengah; F

(b) satu luka laserasi (2 x 0.3cm dan satu luka lebam (3 x 0.5cm) pada belakang bahu kiri;

(c) luka-luka abrasi (terdiri daripada pelbagai bentuk — hampir bulat, segitiga dan bercorak gelombang 'wave-like'), sesetengahnya dengan kesan lebam, antara 0.2 dan 0.5cm saiz, dalam kawasan 22 x 24cm di belakang dada. Terdapat juga satu abrasi 'linear' (9cm panjang) di belakang dada. G

(C) lengan tangan

(1) lengan kanan

(a) satu luka abrasi (2.5cm panjang) pada bahagian hadapan lengan atas kanan; H

(b) tiga luka abrasi dalam kawasan 2cm pada bahagian hadapan pergelangan tangan kanan;

(c) satu luka abrasi 'linear' (3.5 panjang) pada tapak tangan kanan;

(d) satu luka lebam berabrasi (3 x 3cm) pada siku kanan; I

(e) satu luka lebam (1.8 x 0.5cm) di belakang pergelangan tangan kanan;

(f) satu luka lebam (4.5 x 1cm) pada belakang jari manis kanan;

(g) satu luka abrasi (0.5cm saiz) dan satu luka laserasi (0.5 x 0.4cm) pada belakang jari kelingking kanan.

(2) lengan kiri

(a) satu luka hiris (1.5 x 0.3cm) dengan kesan lebam di sekelilingnya (5 x 2cm) pada tapak tangan kiri.

(b) luka-luka abrasi (terdiri daripada pelbagai bentuk — hampir bulat dan segitiga, antara 0.1–0.4cm saiz, dalam kawasan 4 x 3cm) pada tapak tangan kiri.

(c) satu luka lebam berabrasi (5 x 3cm) pada siku kiri.

(d) luka-luka tusukan (kebanyakkannya mempunyai sisi yang 'clean-cut', antara 0.5 x 0.3cm) dan 2.5 x 1.8cm, dalam kawasan 9.5 x 9cm) di belakang jari kiri dan tangan kiri.

(D) kaki

(1) kaki kanan

(a) satu abrasi 'linear' (3cm panjang) di bahagian hadapan peha kanan).

(2) kaki kiri

(a) satu abrasi (2 x 0.3cm) pada bahagian hadapan peha kiri.

[18] Menurut SP12, terdapat luka-luka pada bahagian muka, kepala, leher bersama dengan konjensi pada muka dan paru-paru serta bintik-bintik pendarahan yang dijumpai pada bahagian konjuntiva dan salur pernafasan. Luka-luka pada kulit kepala bersama dengan buah pinggang yang pucat dan kesan darah pada pakaian dan tuala konsisten dengan kehilangan darah yang banyak. Ini menyebabkan pengaliran darah yang membawa bekalan oksigen ke organ-organ dalaman yang penting terganggu. Tekanan pada leher menyebabkan tekanan pada struktur-struktur leher yang penting seperti salur-salur darah dan salur pernafasan. Tekanan pada struktur-struktur ini boleh menyekat pengaliran darah ke otak, mengganggu rentak jantung dan menyukarkan pernafasan. Semua ini boleh mengganggu bekalan oksigen ke organ-organ penting sejurusnya menyebabkan kematian. SP12 mengatakan punca kematian adalah disebabkan oleh 'head injury with pressure to the neck' atau kecederaan pada bahagian kepala dengan tekanan pada leher.

[19] Menurut SP12, kecederaan-kecederaan pada muka dan kepala si mati adalah konsisten dengan penggunaan objek yang tajam, tumpul dan keras. SP12 mengesahkan pisau dan gunting yang ditemui di tempat kejadian adalah objek-objek yang tajam yang boleh menyebabkan kecederaan. SP12 menyatakan tekanan pada leher pula disebabkan oleh objek yang tumpul dan keras seperti cekikan pada leher dengan menggunakan tangan.

[20] SP12 juga mengatakan pemeriksaan dalaman pada bahagian kepala, abdomen dan dada tidak menunjukkan tanda-tanda penyakit yang signifikan. Berdasarkan keterangan SP12 adalah jelas kematian si mati akibat dari kecederaan pada bahagian kepala dengan tekanan pada leher. Mahkamah menerima keterangan SP12.

[21] Berdasarkan kepada kepakaran dan pengalaman saksi dalam bidang forensik seperti yang dinyatakan dalam PSSP12, mahkamah menerima keterangan SP12 untuk membuktikan elemen (ii) pertuduhan.

[23] (xvii) Terdapat DNA si mati pada mata pisau (P14A) dan gunting (P15A) yang dijumpai pada awalnya di sebelah si mati sebelum dicampak oleh SP5 ke tempat

garaj rumah si mati. Keterangan ini konsisten dengan keterangan SP12 bahawa pisau dan gunting adalah objek tajam yang diguna oleh OKT untuk membunuh si mati;

(xxvi) SP12 mengesahkan pisau dan gunting adalah senjata-senjata tajam yang boleh menyebabkan kecederaan dan kematian si mati.

[25] Cebisan-cebisan keterangan di atas secara kumulatif membentuk satu rantaian keterangan yang lengkap dan kukuh membawa kepada satu kesimpulan sahaja iaitu OKT yang telah mendatangkan kecederaan kepada si mati seperti yang telah dinyatakan oleh SP12 dan bukan disebabkan oleh perbuatan orang lain dan tiada sebarang penyakit yang dialaminya menyumbang kepada kematian si mati. Keterangan SP12 telah mengesahkan bahawa kecederaan di Bahagian kepala dan muka adalah diakibatkan oleh senjata tajam seperti pisau dan gunting di mana terdapat DNA si mati dan OKT pada pisau tersebut manakala kecederaan di bahagian leher disebabkan oleh cekikan tangan OKT di leher si mati.

[29] Dalam kes ini niat jahat OKT boleh disimpulkan berdasarkan kepada keterangan SP12 iaitu penggunaan pisau, gunting, tangan dan tempat di mana kecederaan tersebut disasarkan iaitu di bahagian kepala, muka dan leher si mati. Keterangan SP12 mengesahkan punca kematian si mati adalah akibat kecederaan pada bahagian kepala dengan tekanan pada leher.

[30] SP12 mengatakan pemeriksaan dalaman pada kepala menunjukkan haematoma 'subgaleal' pada kulit kepala sebelah hadapan, belakang dan atas. Organ otak menunjukkan pendarahan subaraknoid pada bahagian lobus temporal kanan.

[31] Pemeriksaan pada bahagian leher menunjukkan bintik-bintik pendarahan pada dinding dalaman salur larinks dan trakea dan kesan haematoma sekeliling *carotid sheath* kiri.

[32] Pemeriksaan dalaman bahagian dada menunjukkan konjensi pada organ paru-paru dan pemeriksaan dalaman pada bahagian abdomen menunjukkan buah pinggang kelihatan pucat.

[33] OKT dengan menggunakan pisau, gunting dan tangan telah menyebabkan kecederaan pada sebahagian besar tubuh si mati iaitu di bahagian muka, leher, kepala, dada dan abdomen, bahagian hadapan badan, bahagian belakang badan, bahagian lengan, bahagian kaki. si mati mengalami lebih kurang 41 luka lebam dan luka tetakan.

[34] Luka-luka pada bahagian kepala dan muka menyebabkan kehilangan darah yang banyak menyebabkan pengaliran darah yang membawa bekalan oksigen ke organ-organ dalaman yang penting terganggu. SP12 mengatakan dapatan ini adalah konsisten dengan buah pinggang yang kelihatan pucat dan kesan darah pada pakaian dan tuala.

[47] The appellant's contention on this point is also incorrect because his own written submission referred to instances where the learned HCJ had considered the evidence of PW12. In the written submission, these are stated as follows:

5. The learned trial judge in His Lordship's judgment held that:

[18] Menurut SP12, terdapat luka-luka pada bahagian muka, kepala, leher bersama dengan konjensi pada muka dan paru-paru serta bintik-bintik pendarahan yang dijumpai pada bahagian konjuntiva dan salur pernafasan. Luka-luka pada kulit kepala bersama dengan buah pinggang yang pucat dan kesan darah pada pakaian dan tuala konsisten dengan kehilangan darah yang banyak. Ini menyebabkan pengaliran darah yang membawa bekalan oksigen ke organ-organ dalaman yang penting terganggu. Tekanan pada leher menyebabkan tekanan pada struktur-struktur leher yang penting seperti salur-salur darah dan salur pernafasan. Tekanan pada struktur-struktur ini boleh menyekat pengaliran darah ke otak, mengganggu rentak jantung dan menyukarkan pernafasan. Semua ini boleh mengganggu bekalan oksigen ke organ-organ penting sejurusnya menyebabkan kematian. SP12 mengatakan punca kematian adalah disebabkan oleh 'head injury with pressure to the neck' atau kecederaan pada bahagian kepala dengan tekanan pada leher.

[19] Menurut SP12, kecederaan-kecederaan pada muka dan kepala si mati adalah konsisten dengan penggunaan objek yang tajam, tumpul dan keras. SP12 mengesahkan pisau dan gunting yang ditemui di tempat kejadian adalah objek-objek yang tajam yang boleh menyebabkan kecederaan. SP12 menyatakan tekanan pada leher dengan menggunakan tangan.

[20] SP12 juga mengatakan pemeriksaan dalaman pada bahagian kepala, abdomen dan dada tidak menunjukkan tanda-tanda penyakit yang signikian. Berdasarkan keterangan SP12 adalah jelas kematian si mati akibat dari kecederaan pada bahagian kepala dengan tekanan pada leher. Mahkamah menerima keterangan SP12.

[21] Berdasarkan kepda kepakaran dan pengalaman saksi dalam bidang forensik seperti yang dinyatakan dalam PSSP12. Mahkamah menerima keterangan SP12 untuk membuktikan elemen (ii) pertuduhan.

[Encl 7, pp 22–23]

6. Furthermore, the learned trial judge again referred to the evidence of PW12 and decided that the appellant had the intention under s 300(c) of the Penal Code to cause bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause the death of the deceased. His Lordship decided that:

[29] Dalam kes ini niat jahat OKT boleh disimpulkan berdasarkan kepada keterangan SP12 iaitu penggunaan pisau, gunting, tangan dan tempat dimana kecederaan tersebut disasarkan iaitu di bahagian kepala, muka dan leher si mati. Keterangan SP12 mengesahkan punca kematian si mati adalah akibat kecederaan pada bahagian kepala dengan tekanan pada leher.

...

[33] OKT dengan menggunakan pisau, gunting dan tangan telah menyebabkan kecederaan pada sebahagian besar tubuh si mati iaitu di bahagian muka, leher, kepala, dada dan abdomen, bahagian lengan, bahagian belakang badan, bahagian lengan, bahagian kaki. si mati mengalami lebih kurang 41 luka tetakan.

...

[36] Pisau dan gunting merupakan senjata berbahaya dan berdasarkan bilangan kecederaan yang dialami oleh si mati dan bahagian dimana si mati dicederakan iaitu di bahagian kepala dan dicekik di bahagian leher inferens munasabah ialah OKT mempunyai niat untuk menyebabkan kecederaan tubuh ke atas si mati. Kepala, leher dan muka merupakan bahagian organ manusia yang penting. si mati telah mengalami pendarahan yang ekstensif akibat daripada kecederaan-kecederaan yang dialaminya terutama di bahagian kepala yang menyebabkan pengaliran darah yang membawa bekalan oksigen ke organ-organ dalaman yang penting terganggu. Tekanan pada leher pula telah menyekat pengaliran darah ke otak, mengganggu rentak jantung, menyukarkan pernafasan dan menyebabkan kematian.

[37] Kecederaan tubuh yang disebabkan oleh perbuatan OKT ke atas si mati iaitu luka di bahagian kepala, muka dan tekanan pada leher iaitu dengan mencekik leher si mati dengan tangan adalah kebarangkalian besar menyebabkan kematian si mati dan telah menyebabkan kematian si mati seperti yang dinyatakan oleh SP12. Oleh itu, adalah jelas OKT mempunyai niat untuk mengakibatkan kematian.

[38] OKT telah menggunakan senjata yang tajam iaitu pisau dan gunting dan dia semestinya tahu dengan tindakannya yang menikam di bahagian organ yagn penting secara bertubi-tubi, tikaman itu akan membahayakan dan membawa maut terhadap orang yang diserangnya, *Rusman bin Sulaiman v Public Prosecutor* [2018] supp MLJ 194; [2013] 4 CLJ 305, *Nor Hasnizam Ab Latif v Public Prosecutor* [2020] 1 MLJ 154. OKT juga telah mencekik leher si mati dan kesan-kesan lebam menunjukkan OKT telah mengenakan tekanan yang kuat ke atas leher si mati dengan tangannya. OKT semestinya tahu tekanan yang kuat pada leher akan menyebabkan seseorang itu akan sukar untuk bernafas dan akan menyebabkan kematian.

[39] Mahkamah berpendapat perbuatan OKT yang menyebabkan kematian si mati adalah terangkum di bawah s 300(c) KK. Dari fakta dan keadaan kes, inferen yang paling munasabah iaitu OKT mempunyai niat untuk menyebabkan kecederaan tubuh kepada si mati dan kecederaan tubuh itu mencukupi pada lazimnya untuk menyebabkan kematian elemen (iv) pertuduhan.

[Encl 7, pp 27–30]

8. The post mortem report was tendered and marked as P56 (refer to encl 10, pp 133–142). Reference is made to the post mortem report P56. It is true that there were a lot of marks of injuries found on the deceased. However, it must be appreciated that all these injuries were not fatal in nature. This was clearly stated in PW12's witness statement PS SP12:

'Tulang tengkorak kepala adalah utuh dan tiada kesan keretakan.'

[Encl 9, p 147]

'Walaubagaimanapun, stuktur 'laryngeal' kelihatan utuh.'

[Encl 9, p 148]

'Selain dari itu, pemeriksaan dalaman pada bahagian dada dan abdomen tidak menunjukkan sebarang kecederaan.'

[Encl 9, p 148]

'Terdapat juga luka-luka lain pada badan, lengan tangan dan kaki, yang juga konsisten dengan dua kategori objek iaitu yang tajam, dan objek tumpul dan keras. Tetapi luka-luka ini tidaklah menyebabkan kematian.'

[Encl 9, p 149]

11. PW12 stated that the cause of death was due to head injury with pressure to the neck. However, we would like to refer to PW12's oral evidence specifically as follows:

Further Examination-in-chief of PW12

S16: Apakah punca kematian dalam kes ini ke atas si mati?

J: Punca kematian adalah head injury with pressure to the neck iaitu bermaksud kecederaan kepada kepala disebabkan oleh trauma dari objek yang tumpul dan keras serta objek tajam dan juga tekanan pada leher.

[Encl 9, p 18]

S19: Saya berikan satu contoh, sekiranya seseorang cekik dengan tangan ke atas leher si mati, adakah itu boleh menyebabkan tekanan kepada leher?

J: Ya, boleh.

[Encl 9, p 19]

Cross-examination of PW12

S1: Semasa Doktor check leher mangsa/si mati tidak terdapat sebarang cap jari menunjukkan tanda dia dicekik?

J: Ya, betul.

S2: Adakah kematian mangsa ini sudden death ataupun dia akan cedera baru mati?

J: Saya tidak dapat pasti dengan sebetulnya tetapi berdasarkan hasil pemeriksaan saya kecederaan kepada kepala boleh menyebabkan pendarahan yang banyak. Itu mungkin mengambil masa juga. Begitu juga dengan tekanan kepada leher. Kemungkinan betapa cepat tekanan kepada leher boleh menyebabkan bergantung, adakalanya boleh mengambil masa yang lama sedikit ataupun boleh mengambil masa yang lebih singkat.

[Encl 9, p 20]

[48] Thus, it is abundantly clear, the contention of the appellant that the learned HCJ had failed to consider the evidence of PW12 is totally

misconceived. Even by the appellant's own written submission, as shown above, this contention with respect is not true.

[49] Turning to the appellant's other part of the single issue as narrated above ie the learned HCJ failed to determine which limb of s 300 had been proven by the prosecution, with respect, this is also incorrect. In fact, the appellant counsel himself had acknowledged that the learned HCJ had determined which limb of s 300 had been proven by the prosecution. At para 6 of the appellant's written submission, the appellant stated the learned HCJ had decided the appellant had the intention under s 300(c) of the Penal Code to cause bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause the death of the victim. Thus, it is clear the appellant's submission on this point is incorrect.

[50] In addition, the appellant at p 7 of his written submission further acknowledged that the learned HCJ had determined which limb of s 300 had been proven by the prosecution. In the same, the appellant noted the learned HCJ found as follows:

> Mahkamah berpendapat perbuatan OKT yang menyebabkan kematian si mati adalah terangkum di bawah s 300(c) KK.

[51] Hence, this is not a case where the HCJ had not determined which limb of s 300 had been proven by the prosecution. The learned HCJ had clearly concluded that the appellant had intended to cause the bodily injuries which he knows that bodily injuries would be sufficient in the ordinary course of nature to cause death of the victim as pointed out under s 300(c) of the Penal Code.

[52] That should be sufficient to dispose of the present appeal in view of the approach of the appellant's counsel to pursue the single issue as highlighted above. However, acting out of an abundance of caution, we shall highlight the evidence and the assessment of such evidence to conclude why the prosecution had proven the charge against the appellant.

[53] First, based on the evidence of the witnesses for the prosecution as narrated, the learned HCJ was not wrong in finding a prima facie case had been proven by the prosecution. There was overwhelming evidence as shown by the testimonies of the prosecution's witnesses for the learned HCJ to find a prima facie case made out at the end of the prosecution's case.

[54] Before finding a prima facie case the learned HCJ also correctly subjected all the evidence tendered at the end of the prosecution's case for maximum evaluation (see *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003 1 CLJ 734). He then rightly called for the defence.

[55] First, on the defence of insanity, the learned HCJ referred to the s 84 of the Penal Code. This section states as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[56] However, it is obvious the appellant could not rely on this provision as he was not proven to be of unsound mind. The evidence of the physiatrist, DW2 as narrated earlier showed that the appellant was not suffering from mental disorder and he knew and understood the nature and consequences of his action at the time of the incident. Thus, the appellant was not of unsound mind to seek refuge under this provision.

[57] The learned HCJ also correctly found the facts adduced by the prosecution and not challenged by the appellant as narrated earlier. In this regard, in the Federal Court case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 Justice Raja Azlan Shah (as His Royal Highness then was) said as follows:

> On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony ...

[58] The appellant submitted the injuries on the victim were not fatal in nature. The appellant further submitted the injuries were not to the vital parts of the body like the heart or lung.

[59] This is far from the truth. The injuries resulted in the death of the victim. How much fatal must it get? Death had already ensued. The head is also a vital part of the body. Not just the heart or lung. There were injuries to the head of the victim. Judicial notice is taken, even in football now, when there is collision on the heads of players, the referee is instructed to stop play, so that the players will get immediate treatment. That is how serious an injury to the head is perceived.

[60] PW12, at p 10 of her post mortem report gave her opinion that the cause of death was head injury with pressure to the neck. At p 9 of the same report, she noted injuries on the face and head of the victim, consistent with blunt and sharp force traumas. She also noted there were injuries on the neck, consistent with blunt force trauma.

[61] The appellant also submitted there was no evidence that the appellant had strangled the victim. Even if this is true, the death of the victim was not caused by pressure to the neck alone. It was also caused because of the injuries

to the head. The appellant admitted he stabbed the victim repeatedly and there were head injuries. There were also other injuries. No one else could have caused these injuries except the appellant as he did not challenge the fact he was alone with the victim, as noted by the learned HCJ.

[62] The appellant also had committed culpable homicide amounting to murder. Clearly by his own evidence, he said he stabbed the victim repeatedly, then went to the kitchen to have a drink and came back to the victim to continue stabbing her. How is this not a murder? His action showed he was well aware of the steps he had taken to inflict the serious injuries causing death to the victim. His action also showed he had the intention to inflict the injuries on the victim which he knew under ordinary cause of nature would be sufficient to cause death. Otherwise, he would not have walked back to continue stabbing the victim after taking a drink.

[63] Since the learned HCJ found that s 300(c) of the Penal Code had been proven against the appellant, it is relevant to refer to this provision and it states as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[64] As can be seen, the elements of the provision above can be discerned as follows:

(a) intention of causing bodily injury to any person; and

(b) the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death.

[65] In respect of the first element, the appellant's intention to cause bodily injury is satisfied by his own evidence that he had repeatedly stabbed the victim. This intention is also evident when he stabbed the victim, took a short break to drink and came back to the victim to continue stabbing her.

[66] In respect of the second element, PW12 had given evidence and her post mortem report noted that the injury to the head was the cause of death. In her report too, it was noted that that the head injury was consistent with blunt and sharp force traumas. In this regard, she had testified that the objects such as the knife and a pair of scissors found at the house could be used to inflict the kind of injuries sustained on the head.

[67] Thus, we are of the considered view, both the elements of s 300(c) of the

Penal Code as shown above had been proven by the prosecution. Therefore, since the elements of these provision have been proven, the culpable homicide is murder committed by the appellant.

[68] The exceptions under s 300 of the Penal Code also do not apply for the appellant. The five exceptions under this section are as stated as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.
>
> Exception 2 — Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.
>
> Exception 3 — Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill will towards the person whose death is caused.
>
> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> Exception 5 — Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

[69] With regard to the first exception, as found by the learned HCJ there was no deprivation of the power of self-control by grave and sudden provocation on the part of the appellant because of several reasons.

[70] First, the learned HCJ found that the appellant told the court that he was very angry when the victim was abusive and insulted his parents only when he testified at the defence stage. The witnesses of the prosecution were never cross-examined about this when they testified during the prosecution stage. This according to learned HCJ, only proved and showed that it was an afterthought by the appellant. Thus, there was no grave and sudden provocation.

[71] Second, the learned HCJ found that what was said allegedly by the victim against his parents could not result in the appellant losing control of

himself. There was no evidence why the words of the victim against his parents had made him so angry. There was also no evidence of the background of his parents and whether they too had sought accommodation from the victim and her family. The learned HCJ found without this evidence, the alleged words of the victim against his parents, could not be a real basis that he was facing a grave and sudden provocation.

[72] Third, the learned HCJ found the appellant repeated stabbing of the victim, even taking a break to have a drink, in between the stabbings and causing serious injuries was not consistent with provocation.

[73] Fourth, the learned HCJ also said there could not be pent-up feelings on the appellant as even if the victim had scolded him a few times before, there would have been a cooling off period in between those alleged unpleasant and strong words used by the victim. The learned HCJ found there could not be sustained provocation on the appellant.

[74] Fifth, the learned HCJ also found there was no evidence from any other witnesses supporting the appellant that the victim had been abusive towards his parents before the incident.

[75] On the whole, there is no good reason for us to disturb the findings of fact by the learned HCJ. The learned HCJ was entitled to make those findings of fact since he was the trial judge and he had the advantage of hearing the witnesses first-hand. We are also unable to dispute his assessment that there was no grave and sudden provocation. Hence rightly the first exception to s 300 of the Penal Code could not apply for the appellant. More so when the explanation to this exception as seen above states clearly, whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. This has been pointed out in the case of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 where the Federal Court held that whether there exists grave and sudden provocation is a question of fact which depends on the facts and circumstances of the case. This case held:

> The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s 300 of the PC; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; [1985] 1 CLJ 150; [1985] CLJ Rep 174 (FC)). Each case is to be considered according to its own facts.

[76] The second exception as shown above simply does not apply for the appellant because he was not exercising his right of private defence based on the facts of this case.

[77] The third exception also could not apply for the appellant as he was not a public servant.

[78] The fourth exception too is inapplicable. In order to rely on this exception, the appellant must not act in a cruel or unusual manner. However, the contrary is proven in this case as the appellant admitted he repeatedly stabbed the victim. This proved the appellant acted in a cruel manner. He also acted in an unusual manner because he stabbed the victim, then went to the kitchen to get a drink and went back to the victim to continue stabbing her.

[79] The fifth and last exception as also shown above, does not apply for the appellant as the victim did not in any manner consented to take the risk of death.

[80] In any event, the facts of this case showed the appellant did not pass the test of grave and sudden provocation, as explained in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ Rep 162 where the Supreme Court held:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR [1962] SC 605, 530). In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncrasies of the accused: *Madhavan v State of Kerala* AIR [1966] Ker 258 (260).

[81] Further, based on the facts of this case too, the appellant had not proven that he had any support there was a grave and sudden provocation. This is similar to what was found in the Court of Appeal case of *Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229 where it is said as follows:

> It must be borne in mind that before the above test could be relied upon to determine whether the appellant was provoked to lose his self-control, there must be some evidence of provocation accepted by the court to justify such an evaluation to be carried out. In our instant case, apart from the bare allegations by the appellant in the exculpatory parts of the cautioned statement (P28) (for which he had retracted), *there was not an iota of evidence to support the appellant's contention that he was ever provoked at all.* (Emphasis Added.)

[82] An issue has also arisen in this case whether it is mandatory for the learned HCJ to discuss the differences between ss 299 and 300 of the Penal Code. Thus, it is necessary first to lay down both provisions here.

Section 299 of the Penal Code states:

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[83] While the full s 300 of the Penal Code states:

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[84] Essentially s 299 of the Penal Code deals with the offence of culpable homicide, while s 300 of the Penal Code speaks of the offence of murder. This is pointed out by the Federal Court in *Pubalan a/l Peremal v Public Prosecutor* [2020] 5 MLJ 442; [2020] 8 CLJ 306. This case also states:

In the light of such evidence, we think that it is important for the trial judge to appreciate the distinction between the definitions of culpable homicide and murder under ss 299 and 300 of the Penal Code before arriving at his decision on the offence of which the appellant should have been convicted.

[85] With respect to the appellant, the above case is no authority to say it is mandatory for the learned HCJ to discuss the differences between ss 299 and 300 of the Penal Code. The above case only called on the trial judge to appreciate the distinction between the two provisions. It does not make it mandatory for the learned HCJ in the present appeal to discuss the differences of ss 299 and 300. Appreciating and discussing, are obviously two different things. One could still appreciate without the same being discussed mandatorily. The beauty of a countryside could well be appreciated without the need of the same to be discussed. In any event, it is erroneous if it is ever suggested that the learned HCJ did not appreciate the distinction between culpable homicide and murder. The findings he made as narrated earlier, quite clearly indicate he did not err in appreciating the distinction between the two.

[86] We are also aware of the latest Federal Court case expounding the law on

s 300(c) of the Penal Code, the same provision relevant in the present appeal. This is the case of *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673, where it is held:

> It is irrelevant and totally unnecessary to enquire into what kind of injury the accused intended to inflict. The question is not whether the intention of the accused is to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. In the present case, the injuries that were proved to be present and which the appellant intended to inflict were the injuries on the deceased's head which fractured her skull. *Where the prosecution relies on cl (c) of s 300 of the PC, it is not required to prove intention to cause bodily injury of a kind that is sufficient in the ordinary course of nature to cause death. In the context of the present case, proof of that intention was the appellant's deliberate act of hitting the deceased on her head with the baseball bat, which was totally unrelated to the question whether he intended to cause injury that was sufficient to cause death in the ordinary course of nature*.
>
> Even if the appellant had not intended to cause injury that was sufficient to cause the deceased's death in the ordinary course of nature, or had no knowledge that death would be the likely result, his act would still be murder under cl (c) of s 300 of the PC if otherwise his act of hitting the deceased's head with the baseball bat was intentional and not accidental, or that he intended to cause some other kind of injury. It follows that where the case falls under cl (c) of s 300 of the PC, there is no requirement for the prosecution to prove intention to cause death under cl (a), or knowledge of the likelihood of death under cl (b) or knowledge of the imminent danger of the act under cl (d). *What the prosecution needed to prove in order to bring the case under cl (c) of s 300 is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death*. (Emphasis Added.)

[87] The facts of our present appeal will also accord with the proposition of law on s 300(c) of the Penal Code as expounded in *Zulkiple Mohamad* above. In our case, following this Federal Court decision, it is also not required to prove intention of the appellant to cause bodily injury of a kind that is sufficient in the ordinary course of nature to cause death. Proof of that intention was the appellant's deliberate act of stabbing the victim repeatedly, which was totally unrelated to the question whether he intended to cause injury that was sufficient to cause death in the ordinary course of nature. In our case, what is only needed by the prosecution in satisfying s 300(c) of the Penal Code, following *Zulkiple Mohamad* is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death. On that note, the injury inflicted on the victim in our case was of course not by accident. While the sufficiency of the victim's injury to cause death in the ordinary cause of nature has been explained earlier, especially by the evidence of PW12.

[88] On the whole, it was correct for the learned HCJ to find that the appellant had failed to raise a reasonable doubt in this case. What amounts to

a reasonable doubt has already been explained clearly in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 as follows:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all parts, you say to yourself doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

CONCLUSION

[89] Based on all the reasons explained, we do not think that the learned HCJ had erred in any manner in convicting the appellant for the offence charged and sentencing him to death. The conviction is safe. The HC's decision is accordingly affirmed and the appeal with respect is hereby dismissed.

High Court's decision affirmed; appeal dismissed.

Reported by Dzulqarnain Ab Fatar